It has been noted previously that the existence of the general principle of nominalism flows, at least in part, from the State theory of money. Whilst that theory can no longer be accepted in all its aspects, it nevertheless survives to the extent that the State enjoys the right to define the unit of account and to organise the monetary system. In this sense, the remnants of the State theory continue to support the essential feature of nominalism—ie that an obligation to pay 100 units of a particular currency can be discharged by payment of 100 units of that currency, regardless of any changes in the purchasing power or external value of that currency between the date of the contract and the date of payment. In other words, the State establishes a currency and its units of account represent their own independent value in terms of the domestic legal system, regardless of any external factors which may have an economic impact upon that currency. The need to revise the State theory of money has thus not in any sense brought into question the continued validity of the nominalistic principle. It nevertheless remains necessary to expand upon those points, and to examine other theories which have been put forward in support of the principle.

It is believed that Article VIII(2)(b) would normally present itself to the English courts in the manner just described, ie as a rule which must be applied regardless of the governing law of the contract at hand. But this should not entirely exclude consideration of other private international law matters. In this context, it must be remembered—in view of the breadth of the Fund’s membership—that Article VIII(2)(b) will usually also form a part of the law applicable to the contract. In such an event, the English court would also have to take that provision into account as part of the law which governs the contract, with the following results:

(a) If the evidence demonstrates that the applicable law takes a broader or different approach to the interpretation of Article VIII(2)(b), then the English court should apply this in the usual way, in compliance with Article 10 of the Rome Convention. There would appear to be no consideration of public policy which should prevent the English court from applying such broader interpretation. In accordance with established conflict of law principles, the mere fact that rules of foreign law differ from the corresponding rules of English law does not of itself entitle the English court to disregard them.

(b) If, any respect, the foreign law adopts a narrower view of Article VIII(2)(b), then the English court must apply the
standards determined by English case law because (as shown) the application of the rule is mandatory before the English courts.

In other words, so far as the English courts are concerned, the English approach to the interpretation of Article VIII(2)(b) sets a minimum standard, which must

be applied in any event. But Article VIII(2)(b) may render unenforceable a broader range of contracts, if that is the position required under the law applicable to the contract. As noted above, this unsatisfactory position flows from the fact that Article VIII(2)(b) has not benefited from an internationally uniform approach to its interpretation and application. Against that background, however, the approach just suggested is consistent with the conflict of law principles laid down by the Rome Convention. 21

7 See the discussion of the State theory of money in Ch 1 above.
8 See, in particular the discussion at para 1.50 above.
17 Since the provision forms a part of English domestic law by virtue of the materials mentioned in note 3 above, the application of this provision cannot cause any special difficulty in the context of the conflicts framework created by the Rome Convention. In any event, Art 21 of the Rome Convention confirms that such Convention does not prejudice the application of other conventions binding on the contracting States. Further, in one case, a German court held that it did not need to examine a defence based on Art VIII(2)(b) and an alleged contravention of Austrian exchange controls, on the basis that the contract was governed by German law. This decision was plainly erroneous in the light of the points just discussed, and the decision was reversed by the Supreme Court: A v B Co, 9 April 1962. The decision was apparently unreported but is partly reproduced by Lowenfeld, The International Monetary System (Matthew Bender, 2nd edn, 1984) 334.
18 In other words, it will form a part of the body of rules which govern the validity and interpretation of the contract at hand—see Art 15 of the Rome Convention.
19 ie different to that which the English courts would otherwise adopt. As will be seen (below), the approach to the interpretation of the Article is by no means uniform.
20 For the approach adopted in this area, see Loucks v Standard Oil Co (1918) 224 NY 99; 120 NE 198, 202; Vervaeke v Smith [1983] 1 AC 145.
21 It may be observed that, despite the differing approaches to Art VIII(2)(b) which had by then become apparent, no attempt was made to clarify the provision when the Articles of Agreement were amended in 1976—the point is made by Lowenfeld, International Economic Law (Oxford University Press, 2002) 667. Whilst it is often hazardous to draw inferences from mere inaction, this may reflect the fact that Art VIII(2)(b)—however interpreted—was not felt to have made a major contribution to the overall objectives of the Fund. The Fund itself has recently noted that exchange control regulations will be effective in the territory of the State which imposes them, but that Art VIII(2)(b) has not always been effective in extending that protection to other jurisdictions—see Anne O Kruger, “A New Approach to Sovereign Debt Restructuring” (2002) International Monetary Fund, 37.

Referring Principles:

V.2.3 - Nominal-value principle
V.2.4 - Distribution of currency transfer risk